90-1034

Supreme Court, U.S.
FILED
DEC 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1990

JOHNNY C. COOKSEY,
Petitioner,
v.
PAUL B. COHEN,
ASSISTANT GENERAL COUNSEL OF THE
STATE BAR OF GEORGIA; STATE BAR OF GEORGIA;
SUPREME COURT OF GEORGIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOHNNY C. COOKSEY
1409 Rockcut Road
Apartment B-2
Forest Park, Georgia 30050
Telephone: None

Petitioner Proceeding Pro Se

QUESTIONS PRESENTED FOR REVIEW

1. The important federal question is whether petitioner was afforded a proper hearing on the state level, which is guaranteed by the U.S. Constitution?

2. Whether the district court departed from the accepted and usual course of judicial proceedings, as to call for this Court's power of supervision?

3. Does O.C.G.A. § 9-11-9.1 violate constitutional guarantee of equal protection under the law?

4. Can a state court judgment that is void of jurisdiction, proper service of process and an untimely response, be a bar as to be res judicata, when the void judgment entailed only one of the multiple claims in cv-486?

5. Was the district court clearly erroneous in its finding that: (1) the void state court judgment barred the federal ac-

tions?; (2) petitioner failed to state claims pursuant to 42 U.S.C. § 1983 in both cases?; (3) cv-732 was duplicative of cv-486?; (4) the respondents had complete judicial immunity for acts committed in "clear absence of all jurisdiction?"; and (5) imposing Rule 11 sanctions were justified?

6. Did the district court err in accepting this state court judgment to be admissible evidence and a bar to the federal actions, absent of any requirements pursuant to 28 U.S.C. § 1738 and O.C.G.A. § 24-7-24? If so, did the district court have jurisdiction to review this state court judgment?

7. Should petitioner be permitted to amend his complaint, cv-486, to add all other agencies and individuals referenced in the complaint?

8. Should damages in lieu of demand be considered due to the extent of the deprivations?

NOTIFICATION OF COMBINED PETITION

This Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit includes Appellate Court Case Number 89:8483 (D.C. #1:89-CV-486-WCO) and Appellate Court Case Number 89:8485 (D.C. #1:89-CV-732-WCO), pursuant to and in accordance with United States Supreme Court Rule 12.2.

TABLE OF CONTENTS

Title	Page
QUESTIONS PRESENTED FOR REVIEW	1
NOTIFICATION OF COMBINED PETITION	ii
ORDERS BELOW TO BE REVIEWED	1
JURISDICTION	1,2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	21
CONCLUSION	60
APPENDIX	
Superior Court of Fulton County Order, dated February 8, 1989	1
District Court Order, dated June 9, 1989 for 1:89-CV-486	2-7
District Court Order, dated June 9, 1989 for 1:89-CV-732	8-10
District Court Order, dated June 9, 1989 for 1:89-CV-486 and 1:89-CV-732	11-19
U.S. Court of Appeals for the Eleventh Circuit - Per Curiam	20
U.S. Court of Appeals for the Eleventh Circuit - Denial of Rehearing	21

TABLE OF CONTENTS (cont.)

Title	Page
APPENDIX (cont.)	
Petitioner's letter to State Attorney General's Office	22-23
Petitioner's letter to Governor	24-25
Attorney General's Response	26-27
Governor's Response	28
Georgia Constitution and Statutes	29-37
State Bar Rules & Regulations	37-39
O.C.G.A. § 9-11-9.1 Argument from Attorney-Defendants	40-44

TABLE OF CITATIONS

Title	Page
Acree v. Air Line Pilots Ass'n., 390 F.2d 199 (5th Cir. 1968)	49
Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970)	30,52
Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965)	39,57
Astron Industrial Association, Inc. v. Chrysler Motor Corp., 405 F.2d 958 (5th Cir. 1968)	50
Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319-320, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927)	49
Board of Regents v. Roth, 408 U.S. 564, 569-571, 92 S.Ct. 2701, 2705, 2706, 33 L.Ed.2d 548, 556, 557 (1972)	33,39 57
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113	26,42
City of Vicksburg v. Henson, 231 U.S. 259, 34 S.Ct. 95, 58 L.Ed. 209	51
Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)	53
Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1 Ann. Cas. 870 (1904)	42

TABLE OF CITATIONS (cont.)

Title	Page
Cutsingger v. City of Atlanta, 142 Ga. 555, 83 S.E. 263, 1915B, L.R.A. 1097, 1916 C. Ann. Cas. 280 (1914)	45
Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980)	30
Drummond v. Fulton County Dep't. of Family & Children Servs., 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S.Ct. 2949, 53 L.Ed.2d 1077 (1977)	46
Dunn v. Blumstein, 405 U.S. 330, 341, 92 S.Ct. 995, 1002, 31 L.Ed.2d 274, 284 (1972)	26,27
Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946)	47
Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225-226 (1962)	22
Gregoire v. Biddle, 177 F.2d 579, 581 (1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950)	56
Griffin v. Brecken Ridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 890 (1971)	24
Harper v. Merkle, 638 F.2d 848, 859 (5th Cir. Unit B), cert. denied, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 95 (1981)	55

TABLE OF CITATIONS (cont.)

Title	Page
Headrick v. Fordham, 154 Ga.App. 415, 268 S.E.2d 753 (1980)	38
In The Matters of Lee Roy Murchison and John White, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942	40,57
Ingram v. Wright, 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711	29,34
Kwong Hai Chew v. Colding, N.Y. 1953, 73 S.Ct. 472, 344 U.S. 590, 97 L.Ed. 576	39,57
Lewis v. Price, 104 Ga.App. 625, 200 S.E.2d 129 (1973)	50
Life & Cas. Ins. Co. v. Webb, 112 Ga.App. 344, 145 S.E.2d 63 (1965)	48
Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982)	43
McNabb v. U.S., (1943), 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819	48
Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 43 S.Ct. 625, 29 ALR 1446 (1923)	29
Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691-692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978)	52

TABLE OF CITATIONS (cont.)

Title	Page
Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1976)	32,36, 43
Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989, 991 (1920)	27
Sams v. Olah, 225 Ga. 497, 501, 169 S.E.2d 790, 796 (1969)	34
Securities & Exch. Com. v. Chenery Corp., 318 U.S. 80, 87-88, 87 L.Ed. 626, 632-633, 63 S.Ct. 454	34
Shotkin v. State, 73 Ga.App. 136, 35 S.E.2d 556 (1945), cert. denied, 329 U.S. 740, 67 S.Ct. 56, 91 L.Ed. 638 (1946)	47
Southeastern Metal Prods., Inc. v. Horger, 166 Ga.App. 205, 303 S.E.2d 536 (1983)	47
Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122, 130 (3d Cir. 1985)	43
Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) .	54
U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948)	53,56

TABLE OF CITATIONS (cont.)

Title	Page
United Steelworkers of America v. University of Alabama, 599 F.2d 56, 60 (5th Cir. 1979)	32
Valley v. Northern F.&M. Ins. Co., 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed. 297	58
Vitarelli v. Seaton, 359 U.S. 535, 547, 3 L.Ed.2d 1012, 1021, 79 S.Ct. 968	35
Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718 (1969)	45
FEDERAL CONSTITUTION AND STATUTES	
Fifth Amendment	57,58
Fourteenth Amendment	2,22, 28,29, 31,35, 36,37, 40,42, 51,58
18 U.S.C. § 2071	20
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
42 U.S.C. § 1983	2,30, 35,37, 40,43, 46,52, 55,59

TABLE OF CITATIONS (cont.)

Title	Page
Federal Rule of Civil Procedure 4	13
Federal Rule of Civil Procedure 12(b)(6)	14
Federal Rule of Appellate Procedure 10(e)	20,59
U.S. Supreme Court Rule 10(a)	21,58
STATE CONSTITUTION AND STATUTES	
Article 1, § 1, Paragraph 1	46
Article 1, § 1, Paragraph 2	25,45
Article 1, § 1, Paragraph 12	25,27, 42
O.C.G.A. § 1-2-6	42
9-2-3	26,36, 38,42
9-11-4(c)	7,38
9-11-4(g)	7
9-11-9.1	10,23, 24,25, 27
9-11-26	34
9-11-34	34
16-8-2	41
16-8-3	41
24-7-24	15,47
44-12-21	41,42

TABLE OF CITATIONS (cont.)

Title	Page
O.C.G.A. § 45-15-17	45
45-15-18	45
Fulton County Code § 4-1-40	41
State Bar Rules and Regulations	
Rule 4-202	4,31
Rule 4-203	4
Rule 4-102, Part IV, Standard 4	App.

ORDERS BELOW TO BE REVIEWED

The Order of the Superior Court of Fulton County, Georgia, entered on February 8, 1989, is set out in the Appendix at page 1.

The Orders of the U.S. District Court for the Northern District of Georgia, entered on June 9, 1989 and August 15, 1989, are set out in the Appendix at pages 2-19.

The Orders of the Eleventh Circuit, entered on August 16, 1990, affirming the district court's decisions (without opinion) and on September 18, 1990 denying the petition for rehearing, are set out in the Appendix at pages 20-21.

JURISDICTION

The U.S. District Court for The Northern District of Georgia had jurisdiction pursuant to 28 U.S.C. § 1331.

The U.S. Court of Appeals for the Eleventh Circuit had jursidiction pursuant to 28 U.S.C. § 1291.

The U.S. Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

> "All persons born or naturalized in the United Staces, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const., Amendment 14.

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

42 U.S.C. Section 1983.

STATEMENT OF THE CASE

On May 20, 1988 petitioner filed suit in the State Court of Fulton County against

private attorneys (Ellis H. Abrams and law firm) for negligence and fraud in handling a residential mortgage closing.

Petitioner also proceeded to the State Solicitor-General's Office of Fulton County, Georgia, to file a complaint against these attorneys for thief by taking or thief by deception.

Upon meeting with an investigator in the Solicitor-General's Office, Mr. Secord, petitioner was informed by Mr. Secord that his boss was an attorney and he would not let him take any action against attorneys unless it was rape or murder. Mr. Secord gave petitioner his business card with the name of an investigator at the State Bar of Georgia (hereinafter "State Bar"), and instructed petitioner to go to the State Bar with the complaint. The State Bar's jurisdiction involves only disciplinary action.

Petitioner filed a "Memorandum of Complaint" (hereinafter "MOC") with the State

Bar, with supporting evidence, against these attorneys concerning their actions. This evidence was filed without fear of the attorneys gaining access, inasmuch as the State Bar Rules & Regulations specifically stated that nothing in regards to the State Bar's action would interfere with any other legal action petitioner may have.

Further, the State Bar Rules & Regulations, governing the State Bar, were comprised of procedural protection devices for the protection of the petitioner's rights.

The first protection device was State Bar Rule 4-202 (shown in Appendix at page 37) to protect the initial screening process by the General Counsel of the State Bar. This rule provides that if the MOC was valid, the first procedure was to submit it to the Investigative Panel of the State Bar, and if the complaint was not valid it would be dismissed by the General Counsel, and further stated that nothing in reference to the dis-

missal would interfere with the pending civil case.

The second protection device was State Bar Rule 4-203 (shown in Appendix at page 38) which provides that the Investigative Panel, upon receipt of a valid MOC, would reframe the charges, and before those charges were to be presented to the attorneys, verification would have to be given by the petitioner. Never, at any time, does the State Bar Rules & Regulations provide for anyone within the State Bar to turn-over to the attorneys the original MOC with supporting evidence.

But this is exactly what was done, and was done by Paul B. Cohen, Assistant General Counsel of the State Bar (hereinafter "Cohen").

The action by the State Bar did not end here. Cohen and the State Bar sent to the petitioner a letter informing him of the procedures that would be followed by the

State Bar involving the MOC. This letter was contrary to the appropriate State Bar Rules.

This letter informed petitioner that Cohen would send the MOC directly to the attorneys in the pending civil case.

The attorneys' counsel, in the pending civil case, wrote petitioner a letter cautioning him on any action taken with the State Bar. The next day, after receiving this letter, Cohen sent petitioner a letter informing him that he was forwarding the MOC with supporting evidence to the attorneys in the pending civil case.

The dates of these two letters supports the fact that contact, and a meeting of the minds, had taken place between the State Bar officials and the attorneys in the pending civil case, prior to Cohen notifying petitioner of his action.

On October 25, 1988 petitioner filed suit in the Superior Court of Fulton County against Cohen and The State Bar. The filing

and service of process fees were paid to the court for Fulton County Sheriff's Department to serve the summons and complaints. On the same day, after filing the complaint, petitioner also dropped-off a copy of the complaint to the Clerk of the Supreme Court of Georgia, with instructions to forward the complaint to the appropriate Justice, with hopes that the Supreme Court of Georgia would correct the problem.

The summons and complaints were to be served to Cohen and the State Bar by the Fulton County Sheriff's Department with return proof of service to the court with a copy to petitioner in accordance with O.C.G.A. §§ 9-11-4(c) and 9-11-4(g) (shown in Appendix at pages 30-31).

Petitioner was not mailed a copy of the sheriff's entry of service, nor could he locate proof of service in the court files approximately six weeks after filing the summons and complaints. Approximately three

months later petitioner had not received, nor could be locate, in the court record, proof of service or a responsive pleading to the summons and complaint.

On or about January 17, 1989 petitioner received a motion to dismiss from Cohen and the State Bar, and on or about January 24, 1989 petitioner received a letter from Judge William W. Daniel, Superior Court of Fulton County, informing him of a hearing date set for February 8, 1989 at 8:30 a.m.

On February 8, 1989 petitioner attended that "so-called hearing" not to waive any of his rights, but merely to object and inform the court of the problems concerning the service of process, and the failure of the State Bar and Cohen answering within the required time by law.

At the "hearing" the trial judge requested Cohen and the State Bar's counsel to address the court first with their arguments, and listened attentively. When petitioner

stood before the bench, the trial judge leaned back in his chair and placed a book in front of his face while petitioner objected to the hearing and informed the court of the problems with the service and untimely response.

The trial judge ignored petitioner's argument, and when petitioner ended the trial judge asked the counselor for the order. Counselor took the order from his briefcase, which was predetermined and previously prepared order by Cohen and the State Bar's counsel, stating "...Johnny C. Cooksey's complaint be dismissed with prejudice," (shown in Appendix at page 1).

The trial judge accepted and signed the order in the presence of petitioner and his witness. During the "hearing" the trial judge was not in possession of any court records; nor was a transcript made of the proceeding.

One day after petitioner's complaint was

dismissed against Cohen and the State Bar, the attorneys which received petitioner's MOC with supporting evidence filed a motion to dismiss in State Court of Fulton County, raising (what is believed to be unconstitutional) O.C.G.A. § 9-11-9.1 (shown in Appendix at page 31).

During that same period, petitioner was involved in a lawsuit in the Superior Court of DeKalb County to redress a contract dispute with two attorneys. Petitioner had filed a material men's lien in Superior Court of DeKalb County, and had also researched the deed book earlier and made a copy of the lien. Later, during the proceedings, petitioner could not locate the lien, and further finding that the lien had been totally deleted from the computer listing deed book.

Petitioner tried to set a hearing in DeKalb County Superior Court to deal with this problem. Petitioner was unable to set the hearing, and learned that his previous

judge was no longer assigned to the cases, while the new judge failed to respond to the request for a hearing.

Petitioner believed that this interference, as well as, the problems in the courts of Fulton County were caused by the respondents, Cohen, the State Bar and the Supreme Court of Georgia.

Petitioner had already received a threat on his life, but was now being faced with visual intimidation and other acts requiring special consideration of this problem.

On or about February 27, 1989 petitioner sent a letter to the State Attorney General of Georgia, requesting for an investigation of this problem and the threats on his life, (shown in Appendix at pages 22-23), which contained affidavits with charges concerning all the problems in state court and the actions of state officials.

Petitioner also sent a letter to the Governor of the State of Georgia, requesting

him to insist on the State Attorney General's investigation, and further informed the Governor of the problems (shown in Appendix at pages 24-25).

Approximately one week later, the State Attorney General's office denied petitioner's request for an investigation on the grounds that these respondents were not state officials, state employees or state agencies (shown in Appendix at pages 26-27).

Petitioner believed that all state remedies had been closed to him, as far as, the Fourteenth Amendment was concerned.

On March 13, 1989 petitioner filed federal lawsuit 1:89-CV-486-WCO (hereinafter "cv-486") in the U.S. District Court for The Northern District of Georgia to redress deprivations of federally secured rights under color of state law, raising the federal questions concerning the constitutionality of the entire state proceeding.

On or about March 16, 1989 petitioner

received a letter from the Governor, dated March 13, 1989 (shown in Appendix at page 28). The letter acknowledged receipt of petitioner's letter, and further instructed him to seek an attorney to see if petitioner could address these problems personally.

After complaint cv-486 was filed petitioner was faced with interference in this lawsuit by these same respondents. This interference involved the service of process for cv-486, pursuant to Rule 4(c)(2)(C)(ii) Fed.R.Civ.P., with Express Mail and Certified Return Receipt Requested.

Approximately three weeks after filing cv-486 petitioner had not received the proof of service forms (green cards), and upon investigating the matter petitioner discovered the problem.

On April 12, 1989 petitioner filed another lawsuit, case number 1:89-CV-732-WCO (hereinafter "cv-732") against these same respondents for interfering with the service

of process of petitioner's first federal lawsuit, cv-486.

On April 12, 1989, the same day cv-732 was filed, petitioner requested from the U.S. Department of Justice, Northern District of Georgia, for an investigation to locate petitioner's return proof of service forms in the first lawsuit, cv-486. This request was made because petitioner was in possession of documentation that indicated fraud in connection with the proof of service forms in that case, coupled with the fact that the proof of service forms should have been returned within that long period of time.

In response to the complaints, cv-486 and cv-732, the Supreme Court of Georgia filed a motion to dismiss pursuant to Fed.R. Civ.P. 12(b)(6), while Cohen and the State Bar filed an answer. Later Cohen and the State Bar filed a motion for summary judgment, raising the foreign judgment obtained

in Superior Court of Fulton County as a bar to these lawsuits.

The records and the state judgment was filed in the district court without any authentication as required under 28 U.S.C. § 1738 or O.C.G.A. § 24-7-24.

The respondents filed this certificate showing a silhouette of a seal, while all other characteristics were beyond identification. Petitioner objected in a motion to the district court on the grounds that those documents were falsified and did not exist on state level. Petitioner, further objected to the "total blackout" and unreadable certificate.

In response to petitioner's motion, the respondents moved to refile these documents. Upon refiling, the certificate had been lightened to the degree that petitioner was able to determine that this document was not from the rendering court, it was still absent of the judge's certificate, and beared

an illegible signature of a deputy clerk, and the seal was still not recognizable.

The district court, later in the June 2 hearing, overruled petitioner's objections finding that petitioner merely objected to the certification because he could not read it.

On May 27, 1989 petitioner received five court orders, dated May 24, 1989 from the district court ordering petitioner to appear in court on June 2, 1989 at 1:30 p.m., to argue 20 issues within five cases with only four judicial days notice to prepare and 3½ hours allotted for the hearing.

The petitioner attended the hearing and objected to the district court setting the hearing in that manner and further informed the district court that he was not prepared and that the cases were too important to him to attempt to argue with such short notice.

The district court replied "You filed all the cases and asked for arguments."

Petitioner replied "There are some cases here that I had not requested for anything."

The district court ignored the petitioner's objections and proceeded to conduct the hearing by making rude and sarcastic remarks.

The district court, while hearing arguments by the State of Georgia (in a combined lawsuit totalling 30 million dollars in demand) allowed the state's leading attorney, Mr. Mark Cohen, to sit before him and "sleep," while the other state attorney, Mr. John Hipes, argued and stated to the district court "I never heard of the terms maintenance of action or maintenance of proceeding, and have no idea what they mean."

This type of remark was along the same lines as those of the district court.

The district court, after petitioner had explained the conduct of the state trial judge and the manner in which the hearing was conducted in the Superior Court of Fulton

County, replied to petitioner "he heard it didn't he."

Petitioner, during the hearing, attempted on several occasions, to explain to the district court what the law provides. The district court replied that the petitioner used the law rather loosely.

The district court heard the claims stated by petitioner over and over again, in both cases, but the district court would state each and every time that "we are digressing let's move on."

The petitioner informed the district court that an investigation had been done in connection with case cv-732. The district court asked who performed it. Petitioner replied the U.S. Attorney's Office. The district court then replied "they are not going to give you a criminal report."

The district court, at the end of hearing the state cases, informed petitioner that his complaints, cv-486 and cv-732, were

totally frivolous and he was going to dismiss both complaints.

On June 9, 1989, petitioner filed notice of appeal to the Eleventh Circuit on the district court's announcement. Later, the petitioner received both orders and judgments in the cases, dated June 9, 1989.

The district court found in its June 9th order that cv-486 was barred by the doctrine of res judicata, as to Cohen and the State Bar, inasmuch as it was litigated and adjudicated on the merits in state court, and that it lacked jurisdiction to review a state court judgment. The district court further found that the Supreme Court of Georgia had complete judicial immunity, and that petitioner failed to state a claim upon which relief may be granted.

The district court also found that complaint, cv-732, was duplicative of cv-486, and dismissed cv-732 for the same reasons, as stated in cv-486.

The district court also granted Rule 11 sanctions for cost and attorneys' fees for Cohen and the State Bar.

These cases had not properly been filed in the appeals court, when petitioner realized that the entire files, original and duplicate, in both of these cases were criminally removed from the custody of the district court clerk's filing room in violation of 18 U.S.C. § 2071, for at least two weeks. Also, the district court's court reporter had fraudulently mishandled the purchase order for the transcript, and a fact that two different and separate transcripts were transcribed and filed with the clerk of the district court, and both were alleged to be fraudulent from beginning to end.

At the instructions of the Eleventh Circuit, petitioner motioned to the district court pursuant to Fed.R.App.P. 10(e) to make the record conform to the truth. The dis-

trict court denied the motion in its August 15, 1989 order, denying petitioner the opportunity to correct the transcript (Order shown in Appendix at pages 11-19).

The appeal was taken and granted by the Eleventh Circuit. The Eleventh Circuit affirmed the district court's findings, without opinion, on August 16, 1990 (shown in Appendix at page 20), and later denied petitioner's request for a rehearing filed on August 31, 1990 on September 18, 1990 (shown in Appendix at page 21).

Petitioner is now requesting the U.S. Supreme Court for a Writ of Certiorari to the Eleventh Circuit Court of Appeals, and this petition is under review pursuant to U.S. Supreme Court Rule 10(a).

ARGUMENT

The district court found that these complaints were "totally frivolous," and failed to state claims upon which relief may be granted.

If the allegations in the complaint had been somewhat unclear, the district court was free to allow petitioner to amend the complaint for clarity.

> "The policy of the federal rules is to permit liberal amendments to facilitate determinations of claims on the merits and to prevent litigation from becoming a technical exercise in the fine points of pleading."

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222, 225-226 (1962).

Petitioner will clarify the allegations and show this Court these claims in numerical order as they appear on the face of cv-486.

Petitioner alleged in averment #1 of his complaint in pertinent part:

> "Defendants are duly qualified officers "acting under color of state authority ..."

This allegation applies to each and every allegation within this complaint.

Petitioner alleged in averment #2 of his complaint in pertinent part:

> "Defendants are charged with the development of a "discriminatory administration, application and enforcement "pursuant to Equal Protection Clause ... of the Fourteenth Amendment of the U.S. Constitution, by

misuse of the legislative's delegated powers to govern itself."

This allegation derived from a statute, policies and State Bar Rules & Regulations that petitioner was faced with, and resulted in the deprivations of his liberty and property interests, as well as, established state procedures.

Petitioner was first faced with a statute raised in support of a motion for summary judgment by attorney-defendants in a state case involving negligence and fraud.

This statute, O.C.G.A. § 9-11-9.1, deprived petitioner of his property interest in his remedy and access to court, as well as, his liberty interest in being free to exercise his fundamental rights without state infringement. These deprivations occurred without due process of law.

Petitioner voluntarily dismissed the state complaint against those attorney-defendants, and recommenced the action in

district court, case number 1:89-CV-572-WCO. Those defendants raised this statute in a motion for summary judgment to dismiss the complaint in district court.

The district court chose not to base its findings on statute O.C.G.A. § 9-11-9.1 The petitioner has set forth in the Appendix at pages 40-44, those defendants' arguments, verbatim, regarding O.C.G.A. § 9-11-9.1

This statute, O.C.G.A. § 9-11-9.1, is unconstitutional.

First, the statute has placed pro se plaintiffs and pro se defendants in a particular class of litigants, subjected to invidious discrimination. This class base animus is in violation of the equal protection clauses as guaranteed under the Fourteenth Amendment, U.S.C. Griffin v. Brecken Ridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 1798, 29 L.Ed.2d 890 (1971).

The petitioner, being pro se, will not yield to the belief that a learned attorney

is any more capable of understanding a negligent statute than a learned pro se would be.

This statute is wholly unconstitutional. There can be no justification for allowing an attorney-defendant to dispose of a valid complaint, drafted to perfect the law with solid evidence, simply by stating in an affidavit that he took "reasonable care." The law under any circumstance deny petitioner, as pro se, equal access to the court with an attorney-defendant, which is in violation of Article 1, § 1, Paragraph 2, Georgia Constitution (shown in Appendix at page 29). Article 1, § 1, Paragraph 12 (shown in Appendix at page 29) does not give an advantage to the right of an attorney-defendant defending against a pro se plaintiff prosecuting, and if it had it would be in violation of Article 1, § 1, Paragraph 2.

O.C.G.A. § 9-11-9.1 violates Article 1, § 1, Paragraph 2. This statute is being used

to create an advantage to any attorney-defendant over a pro se litigant. This does not mean that an attorney-defendant does not have legal knowledge advantage in most cases. What petitioner is saying, is that the mental advantage cannot be legislated to give an advantage in the access to courts to prosecute or defend one's own cause.

O.C.G.A. § 9-2-3 (shown in Appendix at page 30) provides a remedy for every right. When this fundamental right is coupled with the right to courts, it becomes petitioner's fundamental right. Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113.

If this statute affects a "fundamental right," it must be measured by a strict scrutiny test. Dunn v. Blumstein, 405 U.S. 330, 341, 92 S.Ct. 995, 1002, 31 L.Ed.2d 274, 284 (1972).

Application of this test requires that the statutory scheme be found unconstitutional unless the state can demonstrate that

such a law is necessary "to promote a compelling government interest." Dunn v. Blumstein, supra.

There is no government interest here that will out-weigh the equal protection under the laws to its citizens.

The right to court guaranteed by Article 1, § 1, Paragraph 12 should not be altered by O.C.G.A. § 9-11-9.1. Paragraph 12, in its present state, conforms to the equal protection clause treatment requirement "that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415, 40 S.Ct. 560, 562, 64 L.Ed. 989, 991 (1920).

A law that will allow an accused tortfeasor to go free, merely on his own affidavit that he took "reasonable care" in committing the tort, and to do so, regardless of the facts in the complaint, as well as, the evidence is unconstitutional.

This case will show actions that demonstrate an invidious discrimination against this pro se litigant class, in favor of attorneys.

Petitioner alleged in averment #3 of his complaint in pertinent part"

> "Defendants are charged with violating plaintiff's civil rights to equal protection and due process of law by the "Entanglement with private acts" pursuant to Equal Protection Clause ... of the Fourteenth Amendment, U.S.C."

This allegation was derived from an overall experience of the separate acts contrary to law, while all the acts are equal under color of law.

This Court will, upon de novo review of this entire case, reach the magnitude of these acts, and how the state used private acts by attorneys, under color of law, as well as, private attorneys acting under color of law contrary to law and policy. These acts deprived pro se petitioner of his

exercise of those protected rights because he was not a member of that preferred class.

> "The Due Process Clause of the Fifth Amendment, later incorporated into the Fourteenth, was intended to give Americans at least the protection against governmental power that they had enjoyed as Englishmen against the power of the Crown. The liberty preserved from deprivation without due process included the right "generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security."

Ingram v. Wright, 430 U.S. 651, 673, 97 S.Ct. 1401, 51 L.Ed.2d 711 (quote from Meyer v. Nebraska, 262 U.S. 390, 399, 67 L.Ed. 1042, 43 S.Ct. 625, 29 ALR 1446 (1923).

Petitioner alleged in averment #4 of his complaint in pertinent part:

> "Defendants are charged with conspiracy for successfully designing and carrying out an illegal and treacherous act for the sole purpose of depriving plaintiff's "fundamental right" pursuant to ... the Fourteenth Amendment, U.S.C. ..."

This allegation is similar to that of averment #3. This Court will, upon de novo review of this entire case, realize the magnitude of this conspiracy, the sole purpose of its design, the amount of malicious tortious injury sustained by the petitioner, as well as, its continuation throughout the federal proceeding.

To show a conspiracy to violate 42 U.S.C. § 1983, petitioner must show that the respondents and others "reached an understanding" to violate petitioner's rights. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 1605, 26 L.Ed.2d 142 (1970); also see Dennis v. Sparks, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

The petitioner has shown that these respondents and others are liable on a conspiracy theory for reaching an understanding to violate petitioner's constitutional rights.

Petitioner alleged in averment #5 of his complaint in pertinent part:

> "Defendants are charged with "maintenance of action," pursuant to ... the Fourteenth Amendment of the U.S. Constitution, by turning-over evidence in support of criminal charges to the party of the civil action suit opposing plaintiff."

Petitioner proceeded with filing his MOC with the State Bar, as well as, his evidence to support the civil action.

The MOC specifically alleged, inter alia, fraud committed by the attorney-defendants. State Bar Rule 4-202 stated that if the MOC alleged any wrong-doing within the rules, such as fraud, the MOC would be turned over to the Investigative Panel of the State Bar.

The respondents, Cohen and the State Bar, blatantly turned over the MOC with the evidence, contrary to their rules.

The letter written by the State Bar, informing petitioner of what they wanted the petitioner to believe and understand, as well

as, their contact with the attorney-defendants and their counsel was indeed a conspiracy designed to deprive petitioner of his liberty and property interests, without due process of law.

First, the petitioner had a property interest in the State Bar Rules & Regulations based on the implicit understanding that the State Bar would not interfere with any other right petitioner may have.

This Court held that "A person's interest in a benefit is a "property interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing." Perry v. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1976) (cited from United Steelworkers of America v. University of Alabama, 599 F.2d 56, 60 (5th Cir. 1979).

Mr. Justice Stewart wrote "... when protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite..." Board of Regents v. Roth, 408 U.S. 564, 569-571, 92 S.Ct. 2701, 2705, 2706, 33 L.Ed.2d 548, 556, 557 (1972).

Petitioner's "property interest," was created and their dimensions are defined by existing State Bar Rules & Regulations, which stem from Georgia state law, and these Rules & Regulations secured petitioner's benefits and support claims of entitlement to those benefits. Board of Regents v. Roth, 408 U.S. at 577, 92 S.Ct. at 2709, 33 L.Ed.2d at 561.

The respondents, Cohen and the State Bar, by turning over his personal property, being the evidence in his case, violated due process, inasmuch as it was done without that paramount hearing.

This further deprived petitioner of his property interest in the discovery laws, O.C.G.A. § 9-11-26 and O.C.G.A. § 9-11-34 (shown in Appendix at pages 31-32), that guaranteed the procedural protection of petitioner's legal property.

This action also deprived petitioner of his liberty interest to the fundamental right to sue without the infringement by the state. Ingram v. Wright, supra.

The respondent Supreme Court of Georgia established the State Bar as its administrative arm and created the rules and regulations governing the State Bar. Sams v. Olah, 225 Ga. 497, 501, 169 S.E.2d 790, 796 (1969).

An agency, such as the State Bar, must be rigorously held to the standard by which it professes its actions to be judged. Securities & Exch. Com. v. Chenery Corp., 318 U.S. 80, 87-88, 87 L.Ed. 626, 632-633, 63 S.Ct. 454.

> "This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that sword."

Vitarelli v. Seaton, 359 U.S. 535, 547, 3 L.Ed.2d 1012, 1021, 79 S.Ct. 968.

This act resulted in a "four count" procedural due process claim pursuant to 42 U.S.C. § 1983.

Petitioner alleged in averment #6 of his complaint in pertinent part:

> "Defendants are charged with "maintenance of action," in an ongoing civil case in DeKalb County Superior Court, between plaintiff and two attorneys, pursuant to ... the Fourteenth Amendment, U.S.C."

The acts of reassigning petitioner's judge, deleting the lien from the deed books and ignoring petitioner's request for a hearing was another opportunity to deprive petitioner of his secured rights under the Constitution.

This unlawful conduct was committed to support two private attorneys. These two

attorneys conspired with the respondents to commit these unlawful acts.

The two attorney-defendants, in the private action, had refused to pay for labor and materials furnished by petitioner. This situation called for the exercise of petitioner's right to remedy. O.C.G.A. § 9-2-3.

The law provides that petitioner shall have a general lien upon the property of the attorney-defendants, in which, petitioner worked for. O.C.G.A. § 44-14-380 (shown in Appendix at pages 34-35).

This statute also gave petitioner a property interest in that right that requires protection. Perry v. Sindermann, supra.

The respondents, by removing the lien from the records, deprived petitioner of his real property in his material and labor, without due process of law as required under the Fourteenth Amendment, U.S.C.

The respondents, without due process of law, also deprived petitioner of his liberty

and property interest in the right to courts and to exercise that right free of state infringement.

These actions constitute a multiple count procedural due process claim pursuant to 42 U.S.C. § 1983.

Petitioner alleged in averments #7 and #8 of his complaint in pertinent part:

> "Defendants ... are charged with "maintenance of proceedings," pursuant to ... the Fourteenth Amendment of the U.S. Constitution, by exerting their authority over the proceedings between the plaintiff and defendants ... to the extent that the presiding judge's actions were malicious and demonstrated a "clear absence of all jurisdiction.""
>
> "Defendants are charged with "maintenance of action" pursuant to ... the Fourteenth Amendment of the U.S. Constitution, by exerting their authority over the state courts, to the extent that the state courts failed to perform "elementary principles of procedural due process" in the filing process of plaintiff's complaint against defendants."

The respondents meddled in this state proceeding for the purpose of denying peti-

titioner his property interest in his remedy under O.C.G.A. § 9-2-3, as guaranteed under the Georgia Constitution.

The respondents accomplished these deprivations first by depriving petitioner of his property interest in the service of process of his summons and complaints. This property interest is the bedrock of due process. Headrick v. Fordham, 154 Ga.App. 415, 268 S.E.2d 753 (1980).

The first step, in the state proceeding, was completed by the petitioner, by filing the summons and complaints with the Superior Court of Fulton County and paying the fees for Fulton County Sheriff's Department to delivery the lawsuits to Cohen and the State Bar, pursuant to O.C.G.A. § 9-11-4(c) (shown in Appendix at page 30).

This was the only step taken in the state proceeding, and the Superior Court, under the direction of the respondents, did

not perform one duty thereafter under O.C.G.A. § 9-11-4.

The respondents deprived petitioner of his real property, being the money paid for filing, and did so without due process of law.

The respondents further deprived petitioner of his property interest in the right to a fair and impartial hearing.

> "It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Board of Regents v. Roth, supra.

Further, the hearing must be granted in a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62, 66 (1965).

And the hearing, under any circumstance, must be a fair one that meets at least currently prevailing standards of impartiality. Kwong Hai Chew v. Colding, N.Y. 1953, 73 S.Ct. 472, 344 U.S. 590, 97 L.Ed. 576.

The respondents deprived petitioner of the right to an impartial judge. What petitioner had forced on him was a bias judge that was not in conformity with due process. In The Matters of Lee Roy Murchison and John White, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942.

The respondents, without due process of law, deprived petitioner of a liberty interest in his right to bring legal action for injury without infringement by the state.

These acts constitute a multiple count procedural due process claim under 42 U.S.C. § 1983.

Petitioner alleged in averment #9 of his complaint in pertinent part:

> "Defendants are charged with exerting their authority over the Consumer Fraud Protection Division of the State Solicitor General's Office of Fulton County to bring about the policy that states, the Consumer Fraud Division cannot engage itself in actions against attorneys except for rape or murder, pursuant to ... the Fourteenth Amendment of the U.S. Constitution."

The petitioner attempted to file a complaint with the Consumer Fraud Division of the State Solicitor's office.

The complaint was pursuant to O.C.G.A. § 16-8-2 or O.C.G.A. § 16-8-3 (shown in Appendix at page 33). The investigator, Mr. Secord, informed petitioner that his bosses' policy, being an attorney, would not engage in any action against attorneys unless it was rape or murder.

This policy is inconsistent with Fulton County Code Section 4-2-40 (shown in Appendix at pages 36-37). The Solicitor's office declined to act, based on that policy and sent petitioner to the State Bar where there is no redress for O.C.G.A. § § 16-8-2 or 16-8-3.

The Georgia Constitution guaranteed petitioner the right to courts, and further guaranteed a right under O.C.G.A. § 44-12-21 (shown in Appendix at page 34).

This Code Section, 44-12-21, is harmonized, as to right and remedy, with O.C.G.A. § 9-2-3. Cox v. Strickland, 120 Ga. 104, 47 S.E. 912, 1 Ann. Cas. 870 (1904).

Petitioner had a property interest in O.C.G.A. § 44-12-21, and under Article 1, § 1, Paragraph 12, it became a fundamental right. Boddie v. Connecticut, supra.

This fundamental right constitutes a liberty interest, in which, petitioner was free to exercise under O.C.G.A. § 1-2-6 (shown in Appendix at pages 29-30).

Petitioner contends that the respondents used their authority and power over the Solicitor General to bring about such an inadequate procedure that deprived petitioner of his property and liberty interest.

Under the Fourteenth Amendment, a state may not authorize the deprivation of a protected property or liberty interest, without providing a satisfactory procedure in connection with that deprivation, that meets the

requirements of due process. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

This inadequate policy used by the Solicitor at the authority of the respondents deprived petitioner of his liberty and property interests without due process of law.

The Solicitor has the authority over relevant procedural process and his actions can constitute "established state procedure" and can be held liable. Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122, 130 (3d Cir. 1985); also see Perry v. Sindermann, 408 U.S. at 601-602, 92 S.Ct. at 2699-2700, 33 L.Ed.2d 570 (1972).

Thus, the respondents, without due process of law, deprived petitioner of his property and liberty interest by establishing an unconstitutional state procedure, constituting a due process claim under 42 U.S.C. § 1983.

Averment #10 omitted.

Petitioner alleged in averment #11 of his complaint in pertinent part:

> "Plaintiff previously requested the Georgia State Attorney General's Office to investigate this matter. Request denied on the grounds that "the Attorney General has no authority to investigate the allegations raised by you, inasmuch as, they do not involve a state agency or public officers and employees of this State."

Petitioner takes this opportunity to amend this averment to allege that Mr. Michael Bowers, individually and in his official capacity as Attorney General of the State of Georgia, and Mr. Joe Frank Harris, individually and in his official capacity as Governor of the State of Georgia, intentionally deprived petitioner of his liberty interest in being secure in his person, and to be free from threats on his life, oppression, intimidations and harassment by state officials and their associates, and the deprivation was without due process of law.

Petitioner's requests and the responses from the Attorney General and the Governor are within the Appendix at pages 22-28.

Respondent Cohen is an employee of the State Bar of Georgia, and the State Bar is the administrative arm of the Supreme Court of Georgia, and is a governmental body. Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718 (1969).

The identity of the Supreme Court of Georgia is self-explanatory, and the Attorney General's response is contrary to O.C.G.A. § 45-15-17 and O.C.G.A. § 45-15-18 (shown in Appendix at pages 35-36).

This freedom and liberty to be secure is guaranteed under Article 1, § 1, Paragraph 2, and this Paragraph is a safeguard against the dangers of arbitrary power. Cutsingger v. City of Atlanta, 142 Ga. 555, 83 S.E. 263, 1915B, L.R.A. 1097, 1916 C. Ann. Cas. 280 (1914).

Further, Article 1, § 1, Paragraph 1 of the Georgia Constitution (shown in Appendix at page 29) guarantees that no one shall be deprived without due process of law, while the Amendment protects life, liberty and property interest from undue interference by the state. Drummond v. Fulton County Dep't. of Family & Children Servs., 237 Ga. 449, 228 S.E.2d 839 (1976), cert. denied, 432 U.S. 905, 97 S.Ct. 2949, 53 L.Ed.2d 1077 (1977).

This act constitutes a procedural due process claim under 42 U.S.C. § 1983.

Complaint, cv-486, before the district court averred in averment #7 that the state court judge was absent of all jurisdiction. Averment #8 alleged that the state court failed to perform any of the procedural process of the state complaint. Averment #12 alleged that the respondents, Cohen and the State Bar, did not answer the lawsuit and that it was dismissed with prejudice.

The district court knew or should have known that these allegations, on the face of the complaint, rendered the state court judgment absolutely void. Shotkin v. State, 73 Ga.App. 136, 35 S.E.2d 556 (1945), cert. denied, 329 U.S. 740, 67 S.Ct. 56, 91 L.Ed. 638 (1946).

The district court had before it a certificate supporting the records from the state court that was not in conformity with 28 U.S.C. § 1738 or O.C.G.A. § 24-7-24 (shown in Appendix at pages 33-34).

There are three requirements for record authentication which were not met in this case. Edmonds v. State, 201 Ga. 108, 39 S.E.2d 24 (1946).

Thus, the state court records, with judgment, was improperly certified in accordance with O.C.G.A. § 24-7-24. Southeastern Metal Prods., Inc. v. Horger, 166 Ga.App. 205, 303 S.E.2d 536 (1983).

The district court by allowing these records to be admissible presents serious questions in the administration of federal civil justice, equivalent to that of McNabb v. U.S., (1943) 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819.

In regards to the district court's handling of cv-732, the first issue confronting the district court was to determine if cv-732 was duplicative of cv-486.

The test to determine the identity of cases, as to be res judicata, under Georgia law, are three prerequistes to which the situation must conform: (1) identity of parties; (2) identity of cause of action; and (3) adjudication by a court of competent jurisdiction. All these elements must concur. Life & Cas. Ins. Co. v. Webb, 112 Ga. App. 344, 145 S.E.2d 63 (1965).

The district court correctly found that the parties were the same. The second re-

quirement was to determine if the cause of actions were the same. Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 319-320, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927).

The cause of actions in both cases appear to be the same. The problem is that "it is the substance of the actions that must be compared and not their form." Acree v. Air Line Pilots Ass'n., 390 F.2d 199 (5th Cir. 1968).

> "In deciding whether the substances of two actions are for res judicata purposes the same, various tests have been advanced ... Would the evidence sustain both judgments? ... "

Id. at 201.

Case cv-486 grew out of illegal conduct committed on the state level. Those charges included the denial of due process by violating State Bar procedures, violating state court adjudication procedures, etc.

The single charge in cv-732 was the interference with established federal pro-

cedure for adjudication process, pursuant to Fed.R.Civ.P. 4 by fraudulently withholding petitioner's proof of service forms during the service of process.

The evidence that would support a judgment in cv-486 would not support a judgment in cv-732. Astron Industrial Association, Inc. v. Chrysler Motor Corp., 405 F.2d 958 (5th Cir. 1968).

This final requirement of adjudication destroys this defense of res judicata. This lack of jurisdiction was shown on the face of the complaint cv-486.

The district court held that cv-486 was barred by a prior state judgment. What the district court failed to realize was that the state judgment was void for want of all jurisdiction, lost through fraud.

In order for res judicata to apply, it must be adjudicated on the merits. Lewis v. Price, 104 Ga.App. 625, 200 S.E.2d 129 (1973).

Thus, the district court should have found that this case, cv-732, was not duplicative and barred by the doctrine of res judicata. And to enforce the rule upon unsubstantial grounds would work injustice. City of Vicksburg v. Henson, 231 U.S. 259, 34 S.Ct. 95, 58 L.Ed. 209.

The second issue confronting the district court was whether petitioner stated a claim upon which relief may be granted.

The allegations in cv-732 were as follows: Paragraph 1 "Defendants are duly qualified officers acting under color of state authority..."; Paragraph 2 "Defendants are charged with "maintenance of action" pursuant to ... the Fourteenth Amendment, U.S.C., for interfering with plaintiff's "fundamental right" to bring civil action for personal injuries."; Paragraph 3 "Defendants are charged with conspiracy for the sole purpose of depriving plaintiff of his fundamental rights, privileges and immunities,

guaranteed under the Constitution of laws of the United States."

The district court should have known that by alleging that a right protected by the Fourteenth Amendment had been infringed upon under color of state authority, stated a claim upon which relief may be granted, as a matter of law. 42 U.S.C. § 1983; Monell v. New York City Dept. of Social Services, 436 U.S. 658, 691-692, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

In regards to the conspiracy, petitioner alleged that the respondents, "plural," conspired to deprive him of constitutionally secured rights, and stated this in paragraph #3 of cv-732. This allegation is sufficient to show a conspiracy under § 1983. Adickes v. S.H. Kress & Co., supra.

The district court was clearly erroneous in holding that these cases were barred by the doctrine of res judicata, and was also clearly erroneous in finding that

cv-732 was duplicative of cv-486. The district court was also clearly erroneous in finding that petitioner failed to state a claim upon which relief may be granted in cv-486 and cv-732.

The district court's findings were not the truth and the right of the cases. U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed. 746 (1948).

It could not have been said, beyond doubt, that petitioner could prove no set of facts in support of his claims which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957).

The third and final issue confronting the district court in cv-732 was the same as in cv-486, and that issue was whether respondent Supreme Court of Georgia was immune from suits cv-486 and cv-732.

The Supreme Court of Georgia, a judicial body, individually and in their official

capacity as the Supreme Court of Georgia, were acting in contravention of all state authority. These respondents were retaliating against petitioner for exercising his rights under the State Constitution.

The respondents' actions were in no way connected to jurisidction, directly or indirectly, with personal or subject matter jurisdiction over the petitioner.

This Court has long set the standard for determining whether a judge is immune for his actions, and this standard is that he is not immune when acting out of clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978).

This standard is ideal for these respondents, inasmuch as they had no jurisdiction and no legal purpose for gaining jurisdiction. These respondents merely used their positions, coupled with their personal

animosity to deprive petitioner of those secured rights.

The Fifth Circuit best summed up a case such as this one, where the Court stated "we hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to "judicial acts." These nonjudicial acts, to state the obvious, are not cloaked with judicial immunity from suit under § 1983." Harper v. Merkle, 638 F.2d 848, 859 (5th Cir. Unit B), cert. denied, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 95 (1981).

The Second Circuit held "we should, of course, not protect a member of the judiciary "who is in fact guilty of using his powers to vent his spleen upon others, or for any

other personal motive not connected with the public good."" Gregoire v. Biddle, 177 F.2d 579, 581 (1949), cert. denied, 339 U.S. 949, 70 S.Ct. 803, 94 L.Ed. 1363 (1950).

The district court erred in finding that the respondent Supreme Court of Georgia had complete judicial immunity in cv-486 and cv-732.

The district court misapprehended the facts in connection with the statutes and legal principles, as well as, misapplying those facts to the statutes and legal principles of these cases. Therefore, the district court's findings were clearly erroneous and was not the truth and right of the case. U.S. v. U.S. Gypsum Co., supra.

The manner, in which, the district court held and conducted this hearing did not afford the petitioner the protection as it is guaranteed under the Constitution.

> "It is the purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Board of Regents v. Roth, supra.

And the hearing must be granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, supra.

What petitioner was granted on June 2, 1989, and throughout these proceedings, would not meet the current prevailing standards of impartiality as required under the Fifth Amendment, U.S.C. Kwong Hai Chew v. Colding, supra.

Further, the district court's actions were blatantly bias, and was not in conformity with due process. In The Matters of Lee Roy Murchison and John White, supra.

This Court summed up the results of a tribunal conducted such as this one. "Courts are constituted by authority, they cannot go beyond the power delegated to them; if they act beyond that authority, and certainly in

contravention of it, their judgments and orders are regarded as nullities, and they are not voidable, but simply void and this even prior to reversal." Valley v. Northern F.&M. Ins. Co., 254 U.S. 348, 41 S.Ct. 116, 65 L.Ed. 297.

This petition for writ of certiorari is under review pursuant to U.S. Supreme Court Rule 10(a) "... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The petitioner has shown that the district court's actions were seriously outside of any acceptable judicial proceeding, and would be held to be unconstitutional from beginning to end, and would definitely be in violation of the petitioner's rights guaranteed under the Fourteenth and Fifth Amendments, U.S.C.

Further, the situation involving the criminal removal of three of five of petitioner's cases, original and duplicate, (two of which are cv-486 and cv-732 and the third is the case dealing with private attorneys conspiring with the state) from the district court clerk's filing room, coupled with the fraudulent transcripts; fraudulent purchase order; fraudulent certified docket entry form; the district court's denial of Rule 10(e) of Federal Rules of Appellate Procedure, district court honoring a judgment void of all jurisdiction, lost through fraud; the filing of this fraudulent judgment with a fraudulent certificate of authenticity; and the district court accepting these two fraudulent documents and denying an array of procedural due process claims under 42 U.S.C. § 1983, "offends a sense of justice" and "shocks the conscience."

CONCLUSION

The petitioner, due to such anomalies by the district court, that affronts the conscience of a civilized society, respectfully request that his Petition For Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted to review and properly rule this case for the furtherance of justice and the preservation of the United States Constitution.

This 19th day of December, 1990.

Respectfully,

Johnny C. Cooksey, Pro Se
Petitioner

1409 Rockcut Road
Apartment B-2
Forest Park, Georgia 30050
Phone: None

IN THE SUPERIOR COURT
OF FULTON COUNTY OF THE
STATE OF GEORGIA

JOHNNY C. COOKSEY, Plaintiff, v. THE STATE BAR OF GEORGIA and PAUL B. COHEN, ASSISTANT GENERAL COUNSEL OF THE STATE BAR OF GEORGIA, Defendants.	)	CIVIL ACTION FILE NO.: D-61708 FILED: 2/8/89

FINAL ORDER

Upon consideration of Defendants' Motion to Dismiss Plaintiff's Complaint, and oral argument on behalf of Defendants, this Court hereby Orders that Plaintiff Johnny C. Cooksey's Complaint be dismissed with prejudice.

This 8th day of February, 1989.

/s/
Hon. William W. Daniel
Judge, Superior Court
of Fulton County

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. COOKSEY VERSUS PAUL B. COHEN, STATE BAR OF GEORGIA and SUPREME COURT OF GEORGIA	CIVIL NO. 1:89-CV-486-WCO FILED JUNE 9, 1989

ORDER

This case is before the court on the motions of the defendants to dismiss or for summary judgment and on numerous motions and "objections" by the plaintiff. The court conducted a hearing on June 2, 1989, and heard from the plaintiff and defendants' counsel on all pending matters. Based on a careful consideration of the record and the arguments of the parties, the court ruled, and does hereby rule, as follows:

The motion to dismiss of Defendant Supreme Court of Georgia (Docket # 2) is GRANTED on the grounds that the plaintiff

failed to state a claim upon which relief could be granted and on the grounds of complete judicial immunity.

The motion of the plaintiff for default judgment against all defendants (Docket # 5) is DENIED based on the court's finding that all defendants filed responsive pleadings within twenty days of acknowledgement of service.

The motion of Defendants Paul B. Cohen and the State Bar of Georgia to dismiss or for summary judgment (Docket # 10) is GRANTED. The court finds that the plaintiff filed a civil complaint against these defendants in the Superior Court of Fulton County, based on the same transaction as the instant case. The plaintiff's case in Fulton Superior Court was dismissed with prejudice, after a hearing on the merits, in a final order on February 8, 1989, by the Honorable William Daniel. The instant case was filed on March

14, 1989. The court finds that the Fulton Superior case constitutes res judicata of all claims against these defendants that were or could have been brought in that case. Allen v. McCurry, 449 U.S. 90, 94 (1980); Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982), cert. denied, 459 U.S. 1147 (1983). Furthermore, this court is without jurisdiction to review a final order of a state court. Accordingly, the defendants' motion for summary judgment is GRANTED.

The plaintiff's motion for a hearing on damages and for entry of a judgment in his favor (Docket # 11) is DENIED as moot inasmuch as the plaintiff's claims have been dismissed and the plaintiff is not entitled to judgment.

The plaintiff's objections to pleadings by "defaulted defendants" (Docket # 12, 15 and 19) are OVERRULED as moot inasmuch as

the court has found that the defendants were not in default.

The plaintiff's objections to the court's interference (Docket # 13 and 14) are OVERRULED. The gravamen of the plaintiff's objections appears to be that the court was in error in allowing the filing of pleadings by defendants the plaintiff considered to be in default. The court found that the defendants were not in default, and therefore the pleadings were properly allowed. The plaintiff furtner objected to the denial by members of the court's staff of the plaintiff's request to see the judge alone. The court again instructs the plaintiff that, as a matter of fundamental fairness, the court may not and will not engage in ex parte communications (statements or arguments made by one party without the presence of a representative of each other party) with a party to a pending action except in such limited

emergency circumstances as are provided by law.

The plaintiff's motion for the court to consider default damages in excess of the amount prayed for in the complaint (Docket # 16) is DENIED as moot inasmuch as the court has found that the defendants were not in default.

The court notes that the plaintiff's motion for a hearing on the motion to dismiss by the Supreme Court of Georgia (Docket # 17) was granted by this court's order of May 24, 1989. The plaintiff's motion for an order submitting the issue of damages to a jury (Docket # 17) is DENIED as moot inasmuch as the court found that the defendants were not in default and the plaintiff's claims have been dismissed.

In conclusion, the court finds that the complaint filed by the plaintiff was frivolous as to all defendants. This order, dis-

missing Defendant Supreme Court of Georgia and granting summary judgment to the remaining defendants, disposes of the plaintiff's complaint in its entirety. The court will hear from the defendants on motions pursuant to Fed. R. Civ. P. 11 for sanctions against the plaintiff.

IT IS SO ORDERED this 9th day of June, 1989.

/s/

WILLIAM C. O'KELLEY
United States District
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. COOKSEY	:	
	:	CIVIL NO.
VERSUS	:	1:89-CV-732-WCO
PAUL B. COHEN, STATE BAR OF GEORGIA and SUPREME COURT OF GEORGIA	:	FILED: JUNE 9, 1989

ORDER

This case is before the court on the motions of the defendants to dismiss or for summary judgment and the plaintiff's motion for default judgment or for summary judgment. The plaintiff also requested a hearing on his motion which the court granted by order of May 24, 1989. The court conducted a hearing on June 2, 1989, and heard from the plaintiff and defendants' counsel on all pending matters. Based on a careful consideration of the record and the arguments of the parties, the court ruled, and does hereby rule, as follows:

The court finds that the complaint in the instant case alleges substantially identical claims growing out of the same transaction against the same parties as the complaint in case number 1:89-CV-486-WCO. By order of this date in case number 1:89-CV-486-WCO, the court found that the plaintiff's claims were frivolous and granted the defendants' motions for dismissal and summary judgment. For the reasons stated therein, the defendants in the instant case, which is duplicative of case number 1:89-CV-486-WCO, are entitled to dismissal, and the unopposed motion to dismiss of Defendant Supreme Court of Georgia (Docket # 2) and the unopposed motion to dismiss or for summary judgment by Defendants Paul B. Cohen and State Bar of Georgia (Docket # 7) are GRANTED. The plaintiff's motion for default judgment against Defendants Paul B. Cohen and State Bar of Georgia (Docket # 3) is DENIED inasmuch as

the defendants were not in default. Furthermore, the plaintiff's motion for summary judgment (Docket # 4) is DENIED. See order in case number 1:89-CV-486-WCO.

In conclusion, the court finds that the complaint filed by the plaintiff was frivolous as to all defendants. This order, dismissing all defendants disposes of the plaintiff's complaint in its entirety. The court will hear from the defendants on motions pursuant to Fed. R. Civ. P. 11 for sanctions against the plaintiff.

IT IS SO ORDERED this 9th day of June, 1989.

/s/
WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. COOKSEY	CIVIL NO.
VERSUS	1:89-CV-486-WCO
PAUL B. COHEN, STATE BAR OF GEORGIA and SUPREME COURT OF GEORGIA	CIVIL NO. 1:89-CV-732-WCO
	FILED: 8/15/89

ORDER

These related cases are before the court on the motions of the plaintiff to temporarily retain the transcript and to cross-reference the transcript in case number 1:89-cv-486-WCO with case number 1:89-cv-732-WCO and on the motion of Defendants Paul B. Cohen, Assistant General Counsel of the State Bar of Georgia, and the State Bar of Georgia for attorneys' fees and sanctions. After conducting a hearing on all pending matters in five cases filed by the plaintiff on June 2, 1989, the court granted the motion to dismiss of Defendant Supreme Court of Georgia, granted the motion of Defendants

Paul B. Cohen and the State Bar of Georgia to dismiss or for summary judgment, and denied the motion of the plaintiff for default judgment against all defendants and numerous other motions by the plaintiff. The court found that the complaint filed by the plaintiff was frivolous as to all defendants. Order, June 9, 1989. Judgment was entered in the defendants' favor, and the action was dismissed, on June 9, 1989, and the plaintiff filed notice of appeal from the judgment on that date.

On June 27, 1989, the plaintiff filed a motion to retain the transcript in the above-styled action in the district court pursuant to Rule 11(c) of the rules of appellate procedure. Rule 11(c) provides as follows, "the parties may stipulate, or the district court on motion of any party may order, that the clerk of the district court shall temporarily retain the record for use by the parties in preparing appellate

papers." Fed. R. App. P. 11(c). Absent a stipulation of the parties, retention of the record is in the discretion of the court. The court notes that the Court of Appeals building is about four blocks away from this court; the plaintiff can as easily obtain the record there as here. The court finds no justification to delay transmission of the record. The plaintiff's motion is accordingly DENIED, and the clerk is directed to transmit the record to the United States Court of Appeals for the Eleventh Circuit.

The plaintiff further moved to cancel the order for the transcript in case number 1:89-CV-732-WCO and to cross-reference the transcript in case number 1:89-CV-486-WCO for use in case number 1:89-CV-732-WCO. The plaintiff's motion is DENIED. To cancel an order for a transcript, the plaintiff should contact the court reporter directly. As to

plaintiff's request to "cross-reference" a transcript in case number 1:89-CV-486-WCO to case number 1:89-CV-732-WCO, the plaintiff appears to be requesting that one copy of the transcript of the June 2 hearing, during which the court heard from the parties on case number 1:89-CV-486-WCO, case number 1:89-CV-732, and others, be cross-referenced for use in the appeal of any of the cases. The handling of the record once it has been transmitted to the United States Court of Appeals is in the control of the clerk of that court. The plaintiff's motion is DENIED because it requests relief which should be considered by the Court of Appeals.

Defendants Paul B. Cohen, Assistant General Counsel of the State Bar of Georgia, and the State Bar of Georgia moved for attorneys' fees and sanctions pursuant to Rule 11 and 42 U.S.C. § 1988. No response was filed as to this motion. See, LR 220-

1(b)(1), NDGa. Rule 11 authorizes the court to impose appropriate sanctions when a pleading is not "well grounded in fact and ... warranted by existing law." Fed. R. Civ. P. 11. The standard for testing conduct under Rule 11 is "reasonableness under the circumstances." Donaldson v. Clark, 819 F.2d 1551 (11th Cir. 1987). Before a party can be subjected to sanctions under Rule 11, and thus deprived of his property, he must be accorded due process and given an opportunity to respond to the invocation of Rule 11 and to justify his actions. Id.

In Sunn v. Dean, 597 F.Supp. 79 (N.D. Ga. 1984) (Forrester, J.), a pro se plaintiff was sanctioned under Rule 11 for filing a civil rights action in federal court after a case he filed in state court based on the same claim resulted in a judgment against him. The court held that it lacked subject matter jurisdiction to re-

view a state court judgment and found that the suit was patently frivolous.

Similarly, in the court's June 9 order in the instant case, the court found that the plaintiff's complaint was entirely frivolous from its inception and was barred under the doctrine of res judicata due to an unfavorable disposition of the identical claims in the Superior Court of Fulton County. Furthermore, the majority of the motions filed by the plaintiff lacked any legal or factual basis as well. Giving due consideration to his pro se status, the court finds that the plaintiff's conduct was not reasonable under the circumstances, and the movants are accordingly entitled to prevail on their motion for sanctions pursuant to Rule 11. The court finds that the extensive hearing held in the plaintiff's pending cases on June 2, 1989, satisfied the plaintiff's right to due process under Donaldson.

The movants submitted an affidavit and other documentation of the attorneys' fees they incurred in defending this frivolous action showing attorneys' fees and expenses totalling $6,894.00. The bill for professional services rendered to the movants in regard to both of the above-styled cases reflects 10.5 hours for attorney David A. Handley, billed at $150.00 per hour, totalling $1575.00, and 54.1 hours for attorney John D. Hipes, billed at $85.00 per hour, totalling $4598.50, and expenses totalling $621.90. The court will deduct 1.8 hours expended by John D. Hipes in preparation of the motions for sanctions, reducing his input to 52.3 hours, for a total of $4445.50. The court finds that the hourly rates, time expended and expenses incurred were otherwise reasonable and necessary. Accordingly, the movants' motion for sanctions pursuant to Rule 11 is GRANTED in the amount of $6642.40.

Finally, the court recently received the "Appellant's Objections to the Transcript of the June 2, 1989 Hearing in the U.S. District Court, N.D.Ga" wherein the plaintiff claimed that the transcript prepared by the court reporter was incomplete and fraudulent. The court reporter prepared a true and accurate record of the June 2 hearing, and the plaintiff's objections are accordingly DENIED.

In conclusion, the plaintiff's motions to retain the transcript, to cancel a transcript order and to cross-reference the transcript of the June 2, 1989, hearing in these related cases are DENIED, and the clerk is directed to transmit the record of both of the above-styled cases to the United States Court of Appeals for the Eleventh Circuit. The motion of Defendants Paul B. Cohen, Assistant General Counsel of the State Bar of Georgia, and the State Bar of Georgia for sanctions pursuant to Rule 11 is GRANTED,

and the plaintiff is ordered to pay movants the amount of $6642.40. The clerk is directed to enter judgment in the movants' favor in that amount. The plaintiff's objections to the transcript of the June 2 hearing in this case are DENIED.

IT IS SO ORDERED this 15th day of August, 1989.

/s/

WILLIAM C. O'KELLEY
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8483
No. 89-8485
Non-Argument Calendar

D.C. Docket No. 1:89-CV-486-WCO
D.C. Docket No. 1:89-CV-732-WCO

JOHNNY C. COOKSEY,

Plaintiff-Appellant,

versus

PAUL B. COHEN, Assistant General Counsel of the State Bar of Georgia; STATE BAR OF GEORGIA; SUPREME COURT OF GEORGIA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

(August 16, 1990)

Before FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

(DO NOT PUBLISH)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8483
No. 89-8485

JOHNNY C. COOKSEY,

Plaintiff-Appellant,

versus

PAUL B. COHEN, Assistant General Counsel of the State Bar of Georgia; STATE BAR OF GEORGIA; SUPREME COURT OF GEORGIA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION FOR REHEARING

Filed by Appellant on August 31, 1990

(September 18, 1990)

BEFORE: FAY, KRAVITCH and COX, Circuit Judges.

PER CURIAM:

The petition for rehearing filed by Appellant, JOHNNY C. COOKSEY, is denied.

ENTERED FOR THE COURT: /s/ Phyllis Kravitch
U.S. Circuit Judge

February 27, 1989

Johnny C. Cooksey
4450 Granada Drive
College Park, GA 30349

Office of Attorney General
132 State Judicial Building
Atlanta, Georgia 30303
Attention: Mr. Michael Bowers,
State Attorney General

Dear Mr. Bowers:

Enclosed please find a package of material consisting of a list of charges, statements of fact, affidavits and supporting evidence. The supporting material is in sequential order as the events occurred in this matter.

I am requesting that the State Attorney General's Office investigate this entire matter to the fullest extent and to bring to justice those that are found to have violated the laws of our state and the oaths of their office.

I trust that you will give this matter your utmost attention for several reasons.

Some of those reasons are that threats have been made against me, the hearing on the Motion for Dismissal in the State Court of Fulton County, Civil Action Number 222646 and what I perceive to be interference taking place in Civil Case Numbers 88-4652-7/88-7984-7 filed in the Superior Court of DeKalb County against two attorneys (husband and wife) for non-payment of lien on property where work was performed.

/s/ Johnny C. Cooksey

Enclosures

February 27, 1989

Johnny C. Cooksey
4450 Granada Drive
College Park, GA 30349

Office of the Governor
Atlanta, Georgia
Attention: Governor Joe Frank Harris

Dear Governor Harris:

I am taking this opportunity to inform you that I have delivered to the State Attorney General, Mr. Michael Bowers, a package containing information and a list of charges that involves state judicial agencies, state officials and others. I have requested for a thorough investigation into this matter.

Governor, over this last year and just recently, there have been threats made against me. I believe it is an attempt to frighten me from seeking justice in this matter. My fear is not in the loss of my life because God has control over my life. My worst fear is the loss of my freedom within a nation which I have laid my life

on the line to preserve. I will never be frightened away by those that are empowered and paid to uphold the laws to protect our country, because as I see it today they are the very same ones that are empowered and paid to destroy those laws and our great nation.

I am asking for your cooperation, as the Governor of Georgia, to insist on a thorough and complete investigation and also to bring to justice those individuals that are responsible for those unlawful acts against the state judicial system.

/s/ Johnny C. Cooksey

cc: Mr. Michael Bowers
State Attorney General

March 6, 1989

The Department of Law
State of Georgia
Michael J. Bowers,
Attorney General
132 State Judicial Bldg.
Atlanta, GA 30334

Mr. Johnny C. Cooksey
4450 Granada Drive
College Park, Georgia 30349

Dear Mr. Cooksey:

Your letter of February 27, 1989, has been referred to me by the Attorney General for review. I must regretfully inform you that the Attorney General has no authority to investigate the allegations raised by you, inasmuch as they do not involve a state agency or public officers and employees of this state. The Attorney General has no general investigative authority.

I regret that we can be of no assistance to you in this matter. I am returning to you

the materials that you sent to me with your letter.

/s/ Mr. George P. Shingler
Senior Assistant Attorney General

Enclosure

March 13, 1989

State of Georgia
Office of the Governor
Joe Frank Harris,
Governor
Atlanta, GA 30334

Mr. Johnny C. Cooksey
4450 Granada Drive
College Park, Georgia 30349

Dear Mr. Cooksey:

This will acknowledge and thank you for your recent correspondence informing me of the information you have provided to the Attorney General concerning officials of this State.

I feel sure the Attorney General will advise you if these are matters that can be resolved on the State level. You may also want to contact a private attorney to see if any of these matters can be addressed by you personally.

With kindest regards, I remain

Sincerely,

/s/ Joe Frank Harris

Received March 16, 1989

GEORGIA CONSTITUTION AND STATUTES

Article 1, § 1, Paragraph 1 provides "No person shall be deprived of life, liberty, or property except by due process of law."

Article 1, § 1, Paragraph 2 provides "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."

Article 1, § 1, Paragraph 12 provides "No person shall be deprived of the right to prosecute or defend, either in person or by an attorney, that person's own cause in any of the courts of this state."

O.C.G.A. § 1-2-6 provides, in pertinent part: "(a) The rights of citizens include, without limitation, the following: (1) The

right of personal security; (2) The right of personal liberty; ... (8) The right to perform any civil function; ... (b) All citizens are entitled to exercise all their rights as citizens, unless specially prohibited by law."

O.C.G.A. § 9-2-3 provides "For every right there shall be a remedy; every court having jurisdiction of the one may, if necessary, frame the other."

O.C.G.A. § 9-11-4(c) provides "Process shall be served by the sheriff of the county where the action is brought or where the defendant is found, or by his deputy, or by the marshal or sheriff of the court, ... When service is to be made within this state, the person making such service shall make the service within five days from the time of receiving the summons and complaint; ..."

O.C.G.A. § 9-11-4(g) provides "The person serving the process shall make proof of service thereof to the court promptly and, in any event, within the time during which the person served must respond to the process. ..."

O.C.G.A. § 9-11-9.1 provides "(a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim. ..."

O.C.G.A. § 9-11-26(a) provides "Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written

interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. ..."

O.C.G.A. § 9-11-34(a)(1) provides "Any party may serve on any other party a request: To produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents ... or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of subsection (b) of Code Section 9-11-26 and which are in the possession, custody, or control of the party upon whom the request is served; ..."

O.C.G.A. § 9-12-16 provides "The judgment of a court having no jurisdiction of the person or the subject matter or which is

void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it."

O.C.G.A. § 16-8-2 provides "A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated."

O.C.G.A. § 16-8-3(a) provides "A person commits the offense of theft by deception when he obtains property by any deceitful means or artful practice with the intention of depriving the owner of the property."

O.C.G.A. § 24-7-24(a)(1) provides "...

The records and judicial proceedings, or copies thereof, of any court of any such state, territory, or possession shall be proved or admitted in other courts within this state by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the attestation is in proper form."

O.C.G.A. § 44-12-21 provides "For every violation of an express or implied contract and for every injury done by another to one's person or property, the law gives a right to recover and a remedy to enforce it. The right is a chose in action, and the remedy is an action at law."

O.C.G.A. § 44-14-380 provides "Laborers shall have a general lien upon the property of their employers which is liable to levy

and sale for their labor, which lien is superior to all other liens except liens for taxes, the special liens of landlords on yearly crops, and such other liens as are declared by law to be superior to them."

O.C.G.A. § 45-15-17(a) provides "The Attorney General, as head of the Department of Law and as chief legal officer of the state, is authorized to institute and conduct investigations at any time into the affairs of the state; or of any department, board, bureau, commission, institution, authority, instrumentality, retirement system, or other agency of the state; or into the affairs of any person or organization to the extent that such person or organization shall have or shall have had any dealings with the state or any department, board, bureau, commission, institution, authority, instrumentality, retirement system, or other agency of the state."

O.C.G.A. § 45-15-18 provides, in pertinent part, "The Governor may at any time direct the Attorney General to conduct an investigation into the affairs of any department of the state or into the official conduct of any state official or employee or into the affairs of any person, firm, or corporation dealing with the state. ... In the event the Attorney General refuses to take or file such action within a reasonable time after having been directed by the Governor to do so, the Governor is authorized to appoint a special attorney general to carry out the requirements of law provided in this Code section."

Fulton County Code Section 4-2-40 provides, in pertinent part, "The Solicitor-General of the Criminal Division of the State Court of Fulton County may appoint investigators for his said office in such numbers as he may deem necessary and proper,

... for the purpose of investigating violators of the laws of Georgia in Fulton County ..."

State Bar Rule 4-202(c) provides "Upon completion of its screening of a complaint, the Office of the General Counsel shall be empowered to dismiss those complaints which are unjustified, frivolous, patently unfounded or which fail to state facts sufficient to invoke the disciplinary jurisdiction of the State Bar of Georgia; provided, however, that a rejection of such complaint by the Office of the General Counsel shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent. Those complaints which appear to allege any violation of Part IV, Chapter 1 of the State Bar Rules shall be forwarded to the Investigative Panel according to procedures established by such Panel in its rules of conduct and procedure."

State Bar Rule 4-203(a)(1) and (2) provides, in pertinent part, "In accordance with these rules, the Investigative Panel shall have the following powers and duties: (1) to receive and evaluate any and all written complaints against members of the State Bar and to frame such charges and complaints as shall conform to the requirements of these rules. A copy of any complaint serving as the basis for investigation or proceedings before the Panel shall be furnished by mail to the respondent. Each complaint received by the Panel, other than those initiated by the Supreme Court or the Panel, shall be verified by the complainant before serving as the basis of proceedings before the Panel; (2)... however, that the rejection of a complaint by the Investigative Panel shall not deprive the complaining party of any right of action he might otherwise have at law or in equity against the respondent;"

State Bar Rule 4-102(d) Standard 4 provides "A lawyer shall not engage in professional conduct involving dishonesty, fraud, deceit, or wilful misrepresentation. A violation of this standard may be punished by disbarment."

B. DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT IN THAT THEY HAVE MET THE APPLICABLE STANDARD OF CARE.

The burden the Plaintiff must carry in proving a legal malpractice case is well settled law in this state:

> In malpractice action against attorneys, as is the case against other professions, it is essential that the competent evidence be presented as to the acceptability of particular conduct ... Hence, except in clear and palpable cases ..., expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which could constitute malpractice.

Berman v. Rubin, 138 Ga. App. 849, 853 (1976) (emphasis added). The Court of Appeals stated the reason for this requirement is that a jury cannot "be permitted to speculate about what the 'professional custom' is. Competent evidence as to the 'professional custom', in a given situation is required in malpractice actions ..." Id. at 853-854.

The Georgia Supreme Court has held:

> [I]n those cases where the plaintiff must produce an expert's opinion in order to prevail at trial, when the defendant produces an expert's opinion in his favor on motion for summary judgment and the plaintiff fails to produce a contrary expert opinion in opposition to that motion, then there is no genuine issue to be tried by the jury and it is not error to grant summary judgment to the defendant.

Howard v. Walker, 242 Ga. 406, 408 (1978).

A defendant who is a learned professional, such as an attorney, may move for summary judgment based solely on his own expert affidavit. Parker v. Knight, 245 Ga. 782 (1980); Payne v. Golden, 245 Ga. 784 (1980). The plaintiff must produce expert testimony to prevail at trial and likewise in response to a defendant's motion for summary judgment. McClure v. Clayton County Hospital, 176 Ga. App. 414 (1985); Terrell v. West Paces Ferry Hospital, Inc., 162 Ga. App. 783 (1982). If the plaintiff fails to produce an expert opinion affi-

davit in opposition to the motion, there is no genuine issue of material fact to be tried to a jury and the defendant's motion must be granted. Howard v. Walker, supra.

Inasmuch as the Affidavits of Ellis Abrams and Thomas Benedict have clearly established compliance by the Defendants with the appropriate standard of care of attorneys, the Defendants are entitled to summary judgment as a matter of law as to the Plaintiff's claim for professional negligence.

C. THE PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED.

Section 9-11-9.1 of the Georgia Civil Practice Act provides in pertinent part as follows:

> (a) In any action for damages alleging professional malpractice, the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

O.C.G.A. §9-11-9.1(a) This recent addition to the Georgia Civil Practice Act became effectively July 1, 1987, and was an express attempt by our legislature to limit the number of frivolous professional malpractice actions brought in the state of Georgia. The legislature, by enacting O.C.G.A. §9-11.9.1, has set forth a specific statutory means by which a plaintiff, in a professional malpractice action, must enforce his cause of action. Where a plaintiff fails to file an affidavit in compliance, his action is subject to dismissal. Barr v. Johnson, Slip op., No. 76919, Georgia Court of Appeals.

The record in the present case clearly shows that the Plaintiff has failed to comply with this pleading requirement of the Georgia Civil Practice Act. The Plaintiff has failed to file the Affidavit of an expert with his Complaint establishing at least

one negligent act or omission on the part of the Defendants and the factual basis for the claim. Accordingly, in the event this Court does not grant Movants' Motion for Summary Judgment, Defendants Ellis H. Abrams and Hudspeth & Benedict respectfully request that the Court dismiss the Plaintiff's Complaint.